No. 92-97

In the Supreme Court of the United States

OCTOBER TERM, 1992

NORTHWEST AIRLINES, INC., ET AL., PETITIONERS

v.

COUNTY OF KENT, MICHIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether airport user fees charged to commercial airlines are reasonable under federal law, irrespective of the fees charged other tenants, when such fees fairly approximate the cost of providing facilities and services to the airlines.

2. Whether the Commerce Clause provides a basis for judicial review of allegedly discriminatory fees imposed by a county-owned and operated airport, despite Congress's enactment of legislation regulating permissible fees.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are seven airline carriers (the Airlines) that brought suit in federal district court claiming that the user fees charged by Kent County International Airport (the Airport) are unreasonable and discriminatory, in violation of federal aviation laws, in particular, the Anti-Head Tax Act, 49 U.S.C. App. 1513(b). The Airlines also argue that the user fees violate the Commerce Clause of the Constitution. The court of appeals rejected the Airlines' claims.

1. Congress has enacted a comprehensive scheme of federal regulation and oversight of the Nation's airways and airports. The Federal Aviation Act (FAA) explicitly preempts all state and local regulation of "rates, routes, or services of any air carrier," while preserving the authority of States and political subdivisions, as airport owners and operators, to exercise their "proprietary powers and rights." 49 U.S.C. App. 1305(a)(1) and (b)(1). Another part of FAA, the Anti-Head Tax Act (AHTA), prohibits state and local governments from imposing so-called "head taxes" directly or indirectly on air passengers. 49 U.S.C. App. 1513(a) (1988 & Supp. III 1991).[1] AHTA, however, does not prohibit state and local governments that own or operate airports from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(b). The Secretary of Transportation (the Secretary) is authorized "to carry out the provisions of" FAA, 49 U.S.C. App. 1354(a), through, *inter alia*, the administrative investigation of complaints and enforcement actions in federal district court. See 49 U.S.C. App. 1482(a), 1487(a).

The Airport and Airway Improvement Act (AAIA) complements FAA. AAIA requires the Secretary to formulate a national airport system plan, one purpose of which is to ascertain airport development needs. 49 U.S.C. App. 2203 (1988 & Supp. III 1991). The statute also provides federal funds for airport development through the Airport and Airway Trust Fund, which is financed with tax revenues on air transportation and aviation fuel. 49 U.S.C. App. 2204 (1988 & Supp. III 1991); 26 U.S.C. 9502 (1988 & Supp. III 1991). The Secretary may approve an application seeking a grant of federal funds for an airport development project only if the airport provides specified written "assurances." 49 U.S.C. App. 2210(a). For example, the project sponsor must assure the Secretary that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that "each air carrier * * * shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges with respect to facilities directly and substantially related to providing air transportation * * * as are applicable to all such air carriers which make similar use of such airport." 49 U.S.C. App. 2210(a)(1). AAIA authorizes the Secretary to prescribe requirements and conduct investigations to ensure compliance with the assurances provided by airport project sponsors. 49 U.S.C. 2210(b), 2218(a).[2]

2. Respondent charges the Airlines landing and aircraft parking fees for their runway use, rent for the terminal space they occupy, and 100% of the Airport's cost of providing "crash, fire, and rescue" service (CFR). Pet. App. 28a. Respondent also charges general aviation (corporate and private aircraft) a "fuel flowage fee," and charges concessions (restaurants, parking lots, etc.) a percentage of their gross receipts. *Id.* at 25a, 29a. The revenues generated from the concessions substantially exceed the concessions' allocated costs and thus yield a sizable surplus. The surplus is used to offset shortfalls and is placed in the Airport's reserve fund for contingencies. *Id.* at 9a, 29a.

The Airlines sought a declaratory judgment that the landing fees, terminal rental rates, and other charges as-

[1] The Anti-Head Tax Act was enacted in response to the Court's decision in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), which sustained a $1 service fee imposed on each commercial airline passenger flying out of the airport. See S. Rep. No. 12, 93d Cong., 1st Sess. 17 (1973). 49 U.S.C. App. 1513(a) and (b) are reproduced in the appendix to this brief.

[2] The Secretary has adopted regulations for investigations and enforcement actions under both FAA and AAIA. See 14 C.F.R. Pt. 13.

sessed by the Airport as of April 1988 are unreasonable and thus unlawful under AHTA and AAIA, and that they impose an undue burden on interstate commerce in violation of the Commerce Clause.[3] Pet. App. 24a, 47a-48a. The Airlines contended that the Airport's rate methodology results in unreasonable rates and profits that greatly exceed the Airport's costs. The Airlines also argued that surplus revenues generated from the fees paid by concessions should be "cross-credited" to the Airlines so as to reduce the latter's fees. Finally, the Airlines claimed that the Airport undercharges general aviation in several respects, thereby discriminating against interstate commercial traffic. *Id.* at 30a.

3. The district court ruled in favor of the Airport. As a threshold matter, the court held that the Airlines have an implied private right of action under AHTA to challenge the Airport's user fees. Pet. App. 44a. The court concluded that there is no such right of action under AAIA, however, because Congress has delegated the responsibility for enforcing that statute to the Secretary. *Id.* at 44a-46a.

On the merits, the district court determined that the Airport's fees are reasonable under AHTA. The court held that, because AHTA refers only to fees charged to "aircraft operators," it does not require cross-crediting of the surplus concession fees in order to lessen the Airlines' own charges. Pet. App. 32a, 36a. In reviewing the fees charged to the Airlines, the court found those fees, with one exception, to be reasonable relative to the benefits conferred. *Id.* at 37a-38a. It concluded that 100% of CFR costs could properly be charged to the Airlines because such expenses are incurred solely due to the presence of commercial airlines at the Airport. *Id.* at 37a. It also rejected the Airlines' claim that the Airport's fee structure discriminates in favor of general aviation, noting

[3] The Commerce Clause states that Congress has the "Power * * * To regulate Commerce with foreign Nations, and among the several States * * *." U.S. Const. Art. I, § 8, Cl. 3.

that the Airport does not recover the shortfall resulting from the undercharge of general aviation from fees assessed against the Airlines. *Id.* at 38a.

Finally, the court found that the Airlines' fees were not subject to Commerce Clause scrutiny, because Congress has acted to regulate airport user fees in AHTA. Pet. App. 46a.

4. The court of appeals affirmed most of the district court's judgment, reversing and remanding only for the proper allocation of CFR costs between the Airlines and general aviation.[4] Pet. App. 17a. The court of appeals agreed with the district court that the Airlines could assert an implied private right of action under AHTA. *Id.* at 4a-6a. The court declined, however, to confer standing on the Airlines to assert claims on behalf of passengers or nonairline users of the Airport. *Id.* at 7a-8a.

In addressing the reasonableness of the Airport's fees under AHTA, the court of appeals found that "[n]on-airline concessions are not within the scope" of the statute. Pet. App. 9a. The court thus concluded that the surplus revenue resulting from concession fees need not be cross-credited to the Airlines to reduce their own charges. *Id.* at 10a. The court also determined that the Airlines are allocated and charged their fair share of the Airport's costs in connection with terminal and other public spaces. *Id.* at 11a-12a. In addition, the court found no basis in AHTA for altering the allocation of costs to general aviation. Although respondent charges the Airlines 100% of the costs attributable to their airside operations (*e.g.*, use of the runways, hangars, and terminal apron) but assesses general aviation only 20% of its corresponding airside costs, the court of appeals concluded that the dis-

[4] Judge Kennedy authored the court's opinion on all issues except for the challenge to the general aviation fees; on that issue, Judge Contie authored the majority opinion. Pet. App. 18a. Judge Nelson dissented with respect to the court's rejection of the Airport's allocation of CFR fees. *Id.* at 20a.

parity does not make the Airlines' fees unreasonable under AHTA, because the Airlines are not required to make up the difference. *Id.* at 18a-20a.

Finally, the court of appeals declined to conduct an independent analysis of the challenged user fees under the Commerce Clause. It concluded that, in enacting AHTA, Congress "established clear guidelines for the fees and rates" that airports charge, thus foreclosing Commerce Clause review. Pet. App. 16a-17a.[5]

DISCUSSION

Petitioners seek this Court's review to clarify the standards under AHTA for assessing the reasonableness of user fees imposed on commercial airlines by airports, and to determine whether fees that pass muster under AHTA are also subject to challenge under the Commerce Clause. In our view, this Court's review is not warranted. The general approach taken by the court of appeals in this case does not conflict with federal law and policy. And, while the interpretation of AHTA by the court of appeals in this case does differ from that of the Seventh Circuit in *Indianapolis Airport Auth.* v. *American Airlines, Inc.*, 733 F.2d 1262 (1984), the significance of that case is limited by its facts, including the court's finding that the airport in that case enjoyed monopoly power, and there has been relatively little litigation, apart from those two decisions, concerning airport fee structures.

Moreover, we believe that the standards in this complex regulatory area should be developed in the first instance by the Secretary of Transportation, who is charged with responsibility to investigate complaints regarding airline user fees and whose decisions are subject to judicial

[5] Chief Judge Merritt dissented (Pet. App. 62a-63a) from the court of appeals' decision to deny rehearing en banc (*id.* at 60a) only with respect to the panel's decision concerning the allocation of the costs of CFR services. His dissent did not address any issue relevant to petitioners' claims in this Court.

review. Although the court of appeals allowed petitioners to proceed directly to federal court, we believe that there is no basis for finding an implied private right of action to enforce the reasonable-fee provision of AHTA, and the formulation of standards by the courts in the first instance threatens to conflict with the Secretary's authority to administer the statute. Although the implied-right issue may eventually warrant review, in view of the paucity of decided cases considering it and the fact that it is unlikely that administrative review would have produced a different outcome in this case, we believe that the petition should be denied.

1. Petitioners' principal complaint (Pet. 5-7, 17 n.11) is that, in determining whether the fees charged to the Airlines are reasonable under AHTA, the court of appeals did not take into account the revenues generated from the Airport concessions. The Airlines argue that, because the concession fees yield a return greater than the Airport's allocated costs, the surplus should be used to defray the fees charged to the Airlines. The court of appeals concluded, however, that AHTA, 49 U.S.C. App. 1513(b), speaks only to fees collected from "aircraft operators," and concession revenues are therefore not required to be considered in evaluating the reasonableness of the fees paid by the Airlines. Pet. App. 9a-10a.

The court of appeals' analysis is consistent with AHTA. The statute prohibits direct or indirect head taxes on persons traveling in air commerce, 49 U.S.C. App. 1513(a) (1988 & Supp. III 1991), but explicitly permits airports to collect "reasonable rental charges, landing fees, and other service charges from *aircraft operators* for use of airport facilities." 49 U.S.C. App. 1513(b) (emphasis added). AHTA thus focuses on the reasonableness of charges assessed against aircraft operators, such as the Airlines, and does not address the reasonableness of fees collected from concessions.

Other provisions of federal law dictate that airports "be available for public use on fair and reasonable terms

and without unjust discrimination," and that air carriers be subject to nondiscriminatory fees for airport facilities "directly and substantially related to providing air transportation." 49 U.S.C. App. 2210(a)(1). The Secretary's policy is that rates and charges should ordinarily correspond to the costs incurred in providing such facilities and services, but airports are given wide latitude in selecting a particular rate methodology and fee structure. As long as the charges to air carriers do not result in revenues that exceed by more than a reasonable margin an airport's costs in servicing those carriers—as appears to be the case here—the charges would be found reasonable under federal aviation law. See FAA, *Airport Compliance Requirements*, Order 5190.6A, § 4-14, at 20-22; App. 5, § a (defining "aeronautical activity") (Oct. 2, 1989). And, under federal law, as "a condition precedent to approval of an airport development project," revenues generated from all airport users (including concessions such as parking lots and restaurants) must make the airport as self-sustaining as possible and must be spent on the airport's capital or operating costs. 49 U.S.C. App. 2210(a)(9) and (12). There is no indication that that is not the case here.

The Airlines also complain (Pet. 6-7) that, while they are charged for 100% of their allocated costs, general aviation is assessed fees that correspond to subtantially less of its fair share of the Airport's costs, resulting in discrimination against the Airlines. The court of appeals disagreed, however, because the shortfall in the costs attributable to general aviation is made up from excess concession revenues, not charges to the Airlines. Pet. App. 18a-20a.

The court's analysis is consistent with the factors the Secretary would consider in determining whether particular airport user fees are unjustly discriminatory. The Secretary's primary concern is that a commercial air carrier is not assessed charges substantially *higher* than either its

own properly allocated costs, or the fees charged to other such air carriers making similar use of the airport. See 49 U.S.C. App. 2210(a)(1). In this case, the Airlines' fees approximate the costs related to their own use of the Airport's facilities. The charges to general aviation are *lower* than its allocated costs, but are not subsidized by the Airlines. General aviation's use of the Airport is also not similar to that of the commercial Airlines. Thus, on the basis of this record, there does not appear to be any "unjust discrimination" under applicable federal law.[6] 49 U.S.C. App. 2210(a)(1).

2. The threshold issue, however, is which body should address the issue of reasonableness in the first instance: the courts or the Secretary. Both the district court and the court of appeals ruled that the Airlines have a private right of action under AHTA. Pet. App. 42a-46a, 4a-6a. Although we do not urge that the petition be granted in order to resolve that issue now, we believe that there is no private right of action to challenge the reasonableness of an airport's user fees under AHTA.

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), the Court identified several factors bearing on whether an implied private right of action exists. Since that decision, the

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[6] Petitioners claim (Pet. 16-17) that the court of appeals misapplied the analysis of *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-717 (1972), in determining that the Airport's fees are reasonable under AHTA. Pet. App. 11a-12a. That contention lacks merit. As we have indicated, the court did not err in finding the fees to be fair in light of the Airport's cost of providing facilities to the Airlines and the benefits provided to the Airlines. Nor are the Airport's fees discriminatory against interstate users, simply because general aviation is assessed fees at a lesser rate than commercial aviation. Quite apart from the fact that the fee differential does not facially distinguish between interstate and intrastate travel (and there is no finding that it would do so in practice), a difference in fees assessed on general and commercial aviation existed in *Evansville* as well, 405 U.S. at 718-719, yet the Court found no discrimination against interstate commerce. *Id.* at 717.

Court has explained that "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-576 (1979); *Suter* v. *Artist M*, 112 S. Ct. 1360, 1370 (1992). Determining congressional intent "is basically a matter of statutory construction," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979), requiring consideration of the language, structure, and legislative history of the statute, especially the enforcement and remedial provisions. *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 536 (1989); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Unless Congress's intent to create a cause of action "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 94 (1981).

The language and structure of both FAA (of which AHTA is a part) and AAIA establish a comprehensive and interwoven scheme of federal regulation of the nation's airways and airports. The clear intent of Congress, reflected in these statutes, is that an airline's complaint about a federally funded airport's user fees must be resolved in the first instance by the Secretary, so as to achieve uniformity in the oversight of the nation's airways and airports. There is no basis for inferring a congressional intent to create a cause of action, directly enforceable in the courts, under AHTA's reasonableness provision.[7]

[7] A few other decisions have concluded (or assumed) that airlines have a private right of action under AHTA. See *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9, 15-16 (1st Cir. 1987); *Indianapolis Airport Auth.*, 733 F.2d at 1265-1266 (addressing the AHTA issue without analysis of implied-right

a. The pertinent language of AHTA contains no reference to any enforcement mechanism, either in the courts or by the Secretary. It simply prohibits direct or indirect head taxes[8] and provides that state-owned or operated airports are not barred from collecting "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. 1513(a) and (b).

The court of appeals inferred, from the absence of any mention of the Secretary or an administrative enforcement scheme in Section 1513(a) or (b), a congressional intent to allow a private cause of action directly in the courts, without exhaustion of administrative remedies. Pet. App. 5a. "But implying a private right of action on

issue); *Rocky Mountain Airways* v. *County of Pitkin*, 674 F. Supp. 312, 314-316 (D. Colo. 1987); *Niagara Frontier Transp. Auth.* v. *Eastern Airlines, Inc.*, 658 F. Supp. 247, 249-251 (W.D.N.Y. 1987); *City & County of Denver* v. *Continental Air Lines, Inc.*, 712 F. Supp. 834 (D. Colo. 1989) (implied right assumed without discussion); *Island Aviation, Inc.* v. *Guam Airport Auth.*, 562 F. Supp. 951, 960 (D. Guam 1982). In our view, those decisions mistakenly failed to appreciate or acknowledge the administrative remedy that Congress provided.

This Court has never addressed the issue. Although the Court has decided cases raising preemption claims under AHTA, none of those cases involved a request for federal court adjudication of the reasonableness of fees under 49 U.S.C. App. 1513(b) and none discussed whether an implied private right of action existed. See *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123 (1987) (ruling on lawfulness of state tax under 49 U.S.C. App. 1513(d)); *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986) (preemption claim with respect to aviation fuel tax imposed on foreign air carrier); *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983) (preemption challenge under 49 U.S.C. App. 1513(a) to tax on airline's gross revenues).

[8] In 1990, Congress added a new subsection (e) to Section 1513, in which the Secretary is specifically delegated certain responsibilities. The new provision grants a limited right to public agencies to impose head taxes to finance "eligible airport-related projects," subject to the Secretary's approval. 49 U.S.C. App. 1513(e) (Supp. III 1991).

the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross*, 442 U.S. at 571. While it is certainly true that Congress intended to benefit airline passengers by prohibiting head taxes and requiring user fees imposed on airlines to be "reasonable," see *Interface Group, Inc.* v. *Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987), that factor alone does not support the inference that Congress must have intended the airlines to have a direct *judicial* remedy to attain that end. See *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2763-2764 (1991). And other evidence indicates that no such remedy was intended.

b. The structure of the statute cuts against the conclusion that Congress intended that courts determine the reasonableness of airline user fees in the first instance. While AHTA does not explicitly provide for administrative review of airline fees by the Secretary, an administrative remedy already existed in FAA and is applicable to claims under AHTA.

AHTA was enacted as part of the Airport Development Acceleration Act of 1973 (ADAA), one purpose of which was "to amend the *Federal Aviation Act of 1958* * * * to prohibit certain State taxation of persons in air commerce." Pub. L. No. 93-44, 87 Stat. 88 (1973) (emphasis added).[9] The incorporation of AHTA into FAA was deliberately designed to take advantage of the Secretary's expertise. As the Senate Legislative Counsel explained, amending FAA, "under which the Federal Government exercises its authority * * * to regulate air transportation, * * * would be the most appropriate method of exercising the authority to pre-empt State and local taxation of passengers engaged in air transportation in the interests of the needs and proper regulation of such

[9] To that end, Congress added a new Section 1113 to Title XI of FAA, now codified at 49 U.S.C. App. 1513(a), (b), and (c). Pub. L. No. 93-44, § 7(a), 87 Stat. 90.

transportation." S. Rep. No. 12, 93d Cong., 1st Sess. 25 (1973).

At the time AHTA was enacted, FAA authorized the Federal Aviation Administrator to conduct investigations, to issue orders, and to promulgate regulations necessary to carry out the provisions of that statute. 49 U.S.C. 1354(a), (b), and (c) (1970). It also provided that any person could file a written complaint with the Administrator concerning the alleged violation of *any* provision of FAA, subject to review in the court of appeals. 49 U.S.C. 1482(a), 1486(a) (1970). Virtually identical provisions exist within FAA today and are implemented by regulations promulgated by the Secretary. See 49 U.S.C. App. 1354(a), (b), and (c); 1482(a); 1486(a); see also 14 C.F.R. Pt. 13. The fact that an administrative remedy for the Airlines' complaint was in place at the time AHTA was enacted as an amendment to FAA is a strong indication of Congress's intent not to create an additional right of action in the courts.[10] See *Middlesex*, 453 U.S. at 14; *Transamerica*, 444 U.S. at 19.

The statute further demonstrates that, "when Congress wished to provide a private * * * remedy, it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. In 49 U.S.C. App. 1487(a), Congress specifically authorized "any party in interest"—as distinguished from the Secretary or the Attorney General—to seek enforcement of Section 1371(a), relating to certificates of public convenience and necessity, in federal district co. t. Enforcement of the remainder of FAA, however, is explicitly entrusted to the Secretary (through administrative or ju-

[10] Indeed, the Secretary has entertained a challenge to landing fees based on an alleged violation of AHTA. See *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 160 (1st Cir. 1989) (noting Secretary's institution of a proceeding to consider, *inter alia*, "whether [an airport's] new landing fee structure violates the Anti-Head Tax Act * * *"). The Secretary ultimately concluded that the landing fees in question did not constitute a head tax. 883 F.2d at 170.

dicial action) or to the Attorney General. See 49 U.S.C. App. 1482, 1487(a). The express grant of a private right of action in Section 1487 is strong evidence of Congress's intent to limit that type of remedy to the instance specified; courts should not supply, by implication, similar remedies elsewhere.

c. The legislative history of AHTA lends no support to the notion that Congress intended the statute to be enforced directly through the courts, rather than through the administrative complaint mechanism existing within FAA. The committee reports contain no discussion regarding any enforcement mechanism, let alone a private right of action. S. Rep. No. 12, *supra,* at 17-26; H.R. Rep. No. 157, 93d Cong., 1st Sess. 2-3, 4-5, 10 (1973); H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. 5-6 (1973). See *Touche Ross,* 442 U.S. at 571. AHTA's legislative history, however, does reflect Congress's intent to establish "a uniform national program of taxation and funding for airport improvements," which had already begun under the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 (repealed; formerly codified at 49 U.S.C. 1701 *et seq.* (1970)), the predecessor to AAIA. S. Rep. No. 12, *supra,* at 21. The Senate Report stresses the role of the federal government as a major participant in airport development and financing. *Id.* at 25-26. A congressional intent to create a private right of action for airlines to challenge an airport's user fees would be wholly inconsistent with the enhanced role for the federal government that Congress clearly envisioned when it enacted AHTA.

d. Not only do the language, structure, and legislative history of FAA and AHTA reveal no congressional intent to create a private right of action to challenge the reasonableness of airport user fees, such a remedy would be incompatible with the companion legislation enacted in AAIA. As petitioners acknowledge, "Congress intended the AHTA to be read in conjunction with" AAIA. Pet. 17 n.11.

AAIA establishes a major role for the Secretary in the development and financing of the nation's airports and contains its own administrative and judicial review procedures. The Secretary approves federal funding for such projects only when their sponsors provide assurances that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and that the rent and other fees charged to "air carriers" will be "nondiscriminatory." 49 U.S.C. App. 2210(a)(1). In addition, the fee structure must make the airport as self-sustaining as possible, and *all* revenues (from concessions and carriers alike) must be used for the capital or operating costs of the airport. 49 U.S.C. 2210(a)(9), (12). If a project sponsor violates an assurance, the Secretary may investigate the matter at a hearing, and if warranted, withhold funding. 49 U.S.C. App. 2218(a), (b)(1). An airport project sponsor may seek review of a decision to withhold funding in a court of appeals. 49 U.S.C. App. 2218(b)(4).

Thus, under AAIA, the Secretary is authorized to assess whether an airport's user fees are reasonable, not unjustly discriminatory, and put to proper purposes.[11] Finding an additional right of action under AHTA for airlines to challenge the same fees directly in court undermines the Secretary's role under AAIA and creates confusion and the potential for conflicting decisions by the Secretary and the courts. See, *e.g., New England Legal Found.* v. *Massachusetts Port Auth.,* 883 F.2d 157, 158-159 (1st Cir. 1989) (discussing confusion by parallel institution of judicial and administrative proceedings). Requiring that complaints be first presented to the Secretary eliminates that possibility and ensures the uni-

[11] The Department of Transportation advises us that virtually all of the Nation's airports serving commercial airlines have development projects that implicate the requirements of 49 U.S.C. App. 2210.

formity in oversight of the nation's airports and airways that Congress intended.[12]

Providing for administrative determination of the reasonableness of airport fees is logical. The Secretary has broad authority to remedy unreasonable or unjustly discriminatory airport user fees. As the court in *Indianapolis Airport Auth.*, 733 F.2d at 1270, recognized, "the powers of a federal court in regulating rates are more limited than those of an administrative agency." Moreover, by exercising authority delegated by AAIA to withhold federal funds, the Secretary has significant leverage over airports to achieve the establishment of reasonable rental charges and other fees.

3. Petitioners contend (Pet. 13-16) that this Court's review is warranted to resolve a conflict between the decision below and the Seventh Circuit's decision in *Indianapolis Airport Auth., supra.* In that case, the court of appeals concluded that the airline fees at issue were "unreasonable under the applicable state and federal standards," 733 F.2d at 1266, because the airport's concession fees were in excess of the costs of service furnished, were borne by the passengers, and, when added to the fees imposed on airlines, were "wholly disproportionate to the costs to the airport of serving the airlines and their passengers." *Id.* at 1268. The court also found the disparity between fees charged to commercial airlines and to general aviation to raise concerns about discrimination against interstate commerce. *Id.* at 1271.

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[12] Congress confirmed that it expects the Secretary to rule on the lawfulness of airport fee structures in Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 100-457, 102 Stat. 2125 (1988). There, Congress explicitly acknowledged the Secretary's role in determining whether an airport's landing fee structure is consistent with both FAA and AAIA and established a date by which the Secretary was to issue such a decision in a case involving Boston's Logan International Airport. 102 Stat. 2130-2131.

Although the general approach of the Seventh Circuit differs from that taken by the court of appeals here, the tension does not warrant resolution by this Court. First, the precedential significance of *Indianapolis Airport Auth.* is limited by the court's emphasis on the fact that the airport in that case enjoyed monopoly power and was therefore in a position to charge a monopoly price. 733 F.2d at 1266-1267. The court of appeals here distinguished *Indianapolis Airport Auth.* on that basis, Pet. App. 9a-10a, and, of the few federal decisions addressing reasonableness issues, none appears to have followed the Seventh Circuit's approach. At all events, as we have explained, we believe that the standards of reasonableness under AHTA should be formulated administratively, not through direct judicial decisionmaking. That is the proper course for development of more uniform standards, rather than an undertaking by this Court to address those questions in the absence of an administrative determination.

4. Finally, petitioners contend (Pet. 18-19) that the court of appeals erred in declining to review the Airport's fee structure under the Commerce Clause. That claim does not merit review. The court's decision is consistent with those of the two other circuits that have addressed the question. See *New England Found.*, 883 F.2d at 174, 176; *Indianapolis Airport Auth.*, 733 F.2d at 1266.[13] The decision also accords with this Court's precedents.

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[13] Petitioners claim (Pet. 15) that the decision conflicts with *Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) (per curiam), and *Alamo-Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991). In those cases, the courts undertook a Commerce Clause review of user fees charged to car rental companies. AHTA—which pertains to reasonable charges collected from "aircraft operators"— was not implicated in either case. Even if we assume that those decisions were correct in conducting a Commerce Clause analysis at the behest of those non-aircraft parties, petitioners have no standing to raise such claims. See Pet. App. 7a-8a.

In *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946), the Court held that, when Congress has exercised its power under the Commerce Clause, a court is "not required to determine whether [a state] tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act." The Court reaffirmed that principle in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982):

> Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.

More recently, the Court has said that Congress's intent to exempt a state regulation or tax from Commerce Clause analysis must be "expressly stated," *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), and "unambiguous," *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 802 (1992).

Although petitioners assert (Pet. 18-19) that AHTA is not sufficiently "express," the comprehensive scheme of federal regulation and oversight of the Nation's airways and airports, set forth in FAA, AHTA, and AAIA, leaves no doubt that Congress has acted and "struck the balance it deems appropriate." *Merrion*, 455 U.S. at 154. See S. Rep. No. 12, *supra*, at 25 (Congress has exercised its Commerce Clause authority in the field of air transportation by enacting FAA and AHTA).[14] Petitioners

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[14] Petitioners' reliance (Pet. 19 n.12) on *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986), is misplaced. That case stated only that it was "plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers." *Id.* at 7. The clear implication of the opinion is that 49 U.S.C. App. 1513 *does* answer the Commerce Clause issue as to taxes and user fees imposed on domestic carriers.

err in contending that, if the court of appeals correctly concluded that AHTA does not apply to charges assessed to non-airline concessions, review under the Commerce Clause must be undertaken at least as to those fees. Irrespective of the scope of AHTA, it is clear that *in AAIA* Congress has explictly and unambiguously addressed the subject of airport fees and rentals charged to all airport users.[15] See 49 U.S.C. App. 2210(a)(1), (9), (12). The court of appeals therefore correctly found that Commerce Clause review is foreclosed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully summitted.

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[15] AAIA is more comprehensive in its coverage of fees than were the predecessor provisions in force at the time this Court decided *Evansville, supra.*

APPENDIX

49 U.S.C. App. 1513(a) and (b) (1988 & Supp. III 1991) provide:

§ 1513. State taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision theerof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except as provided in subsection (e) of this section and except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air tranpsortation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Permissible State taxes and fees

Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or posses-

sions of the United States or political agencies of two or more States) from the levy or collection of taxes, franchise taxes, and scales or use taxes on of this section, including property taxes, net income taxes, franchise taxes, and scales or the use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

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